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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1128

ELSE WILLHEIM and RANDOLPH PHILLIPS,

Petitioners,

v.

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners d/b/a MURCHISON BROTHERS; and INVESTORS DIVERSIFIED SERVICES, INC.,

Respondents,

INVESTORS MUTUAL, INC.,

Defendant.

BRIEF OF RESPONDENT INVESTORS DIVERSIFIED SERVICES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1964

No. 1153

ELSE WILLHEIM and RANDOLPH PHILLIPS,

Petitioners,

v.

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners d/b/a MURCHISON BROTHERS; and INVESTORS DIVERSIFIED SERVICES, INC.,

Respondents,

INVESTORS MUTUAL, INC.,

Defendant.

BRIEF OF RESPONDENT INVESTORS DIVERSIFIED SERVICES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondent Investors Diversified Services, Inc. ("IDS") in opposition to the petition of Randolph Phillips and Else Willheim for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the District Court, dated June 22, 1964, granting respondent's motion for summary judgment dismissing the complaint, is reported at 231 F. Supp. 142 (S.D.N.Y. 1964). The opinion of the Court of Appeals, dated February 10, 1965, unanimously affirming the decision of the District Court, is reported at 342 F.2d 33 (2d Cir. 1965) and has been reproduced as Appendix B to the Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 10, 1965. The petition for writ of certiorari was filed on May 11, 1965. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. §1254(1).

Questions Presented

At all relevant times, pursuant to written agreements, IDS served as investment adviser and principal underwriter for Investors Mutual, Inc. ("Mutual"), a registered open-end investment company. As required by sections 15(a)(4) and 15(b)(2) of the Investment Company Act of 1940 (the "Act"), 15 U.S.C. §§80a-1 through 80a-52, these agreements provided for their automatic termination in the event of their assignment. "Assignment" is defined by section 2(a)(4) of the Act to include:

> ". . . any direct or indirect transfer . . . of a contract . . . by the assignor, or of a controlling

> block of the assignor's outstanding voting securities by a security holder of the assignor . . . ."

Thus, if IDS had transferred its contracts with Mutual or if there had been a transfer of a controlling block of IDS stock, such contracts would have been assigned and terminated. It is undisputed that there was no such transfer.

Alleghany Corporation ("Alleghany"), a publicly held corporation not a party to this action, has owned at all relevant times and to this date no less than 47.6% of the outstanding voting securities of IDS. As a result of a bitterly-waged and much-publicized proxy contest during the spring of 1961, the incumbent management of Alleghany, consisting of Allan P. Kirby and his nominees, was voted out of office by the stockholders of Alleghany and was replaced by the Murchison brothers and their associates. Petitioners claim that this constituted an assignment of the IDS-Mutual contracts.

Although stated in six different ways in the Petition (pp. 2-5), the sole question which petitioners offer for review is the following:

> 1. Does every change in the control or management of IDS or of Alleghany, regardless of the fact that it does not involve either a transfer of the investment advisory and underwriting agreements between IDS and Mutual or the transfer of a controlling block of voting securities by a security holder of either IDS or Alleghany, constitute an "assignment" within the meaning of section 2(a)(4) of the Act and result in automatic termination of the IDS-Mutual agreements?

Two other questions, which were presented below, are noted for the convenience of the Court:

> 2. Can Alleghany, a separate corporate entity, be considered the investment adviser and principal underwriter of Mutual by reason of its ownership of 47.6% of the voting stock of IDS, so that a transfer of a controlling block of voting securities of Alleghany by a security holder of Alleghany would constitute an "assignment" of the investment advisory and underwriting agreements between IDS and Mutual?
>
> 3. Was there in fact a transfer of a controlling block of voting securities of Alleghany by a security holder of Alleghany?

Petitioners have not asked this Court to review Questions 2 and 3 and they have stated no reason why a writ of certiorari should be granted to review Question 1.

Statutes Involved

The statute involved is the Investment Company Act of 1940, 15 U.S.C. §§80a-1 through 80a-52, and particularly sections 1(b)(6), 2(a)(4), 15(a)(4) and 15(b)(2). These sections are printed in Appendix A to the Petition.

Statement of the Case

This is a stockholders' derivative action commenced and conducted on behalf of Mutual by petitioner Randolph Phillips, appearing *pro se*, who is joined by his mother-in-law as co-plaintiff and co-petitioner. In

this action, petitioners contend that by reason of the 1961 Alleghany proxy contest there was by operation of law an "assignment" and termination of the investment advisory and underwriting agreements then in effect between IDS and Mutual. This contention, which was rejected by the courts below, is grounded upon a construction of the Act which does violence to its language, is at war with its legislative history, and would create unworkable ambiguities in its administration. Such construction was contrived by Phillips only after he ceased to be a director of IDS.[1]

The relevant facts, which are undisputed, have been stated in the opinions of the courts below. However,

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[1] Phillips served as a director of IDS from April, 1960, until April, 1961, during which time he first became a stockholder of Mutual and other funds which IDS serves as investment adviser. After he ceased to be a director of IDS, he commenced suing IDS. See *Phillips* v. *Investors Diversified Services, Inc.*, 63 Civ. 1436, S.D.N.Y.; *Phillips* v. *Bradford*, 63 Civ. 2292, S.D.N.Y.; *Ackert* v. *Ausman*, No. 14976/60, N.Y. Sup. Ct., N.Y. County; *Ackert* v. *Bryan*, No. 27240, 2d Cir. (mandamus); *Glicken* v. *Bradford*, 61 Civ. 938, S.D.N.Y.; *Investors Mutual, Inc.*, No. 812-1550, SEC. In each of these actions Phillips appeared as the antagonist of IDS, either as plaintiff, intervenor or objectant; in each he appeared *pro se;* and in each his conduct of the litigation was characterized by what Judge Kaufman of the Second Circuit, in one instance, described as "bizarre" proceedings, "meritless moves . . . which serve only to distract us from important judicial business" and the "cavalier and outrageous use of the federal courts —and indeed other forums—for his unrestrained attacks upon the personal veracity and professional competence of counsel." *Ackert* v. *Bryan, supra,* order dated June 21, 1962 (concurred in by Clark and Friendly, *JJ.*). Each of these actions, except *Phillips* v. *Investors Diversified Services, Inc:* and the SEC proceeding, has been finally determined, and in each the position of Phillips was rejected. In the SEC proceeding the hearing examiner ruled against Phillips on all issues except those relating to jurisdiction. Exceptions are pending before the SEC. The case of *Phillips* v. *Investors Diversified Services, Inc.* has been rendered moot by subsequent events.

in view of the misleading statements contained in the Petition,[2] we here briefly summarize the salient facts:

Pursuant to written agreements, IDS is now and has been Mutual's investment adviser and principal underwriter. (29b, 67b-68b).[3] The investment advisory agreement was approved by the vote of Mutual's shareholders on April 6, 1960 and, on the same day, the underwriting agreement was approved by Mutual's board of directors. (29b). As required by section 15 of the Act, each agreement provided for its automatic termination in the event of assignment. (35b, 65b).

[2] In their Petition, pages 6-8, petitioners purport to set forth what they call "The Admitted Ultimate Facts". In many cases these purported facts, like other purported facts scattered throughout the Petition, are neither "admitted" nor supported by the record; in other cases, they are not "ultimate" facts; and in still other cases they are not even "facts". Moreover, the citations which petitioners give to their Appendix below are in large measure not references to any portion of the record printed in such Appendix but are references to petitioners' personal "Summary of Record Facts", drawn from a variety of sources such as newspapers, proceedings before administrative tribunals, the Congress, and Phillips' unsupported conclusions, none of which meets the tests prescribed by Rule 56(e) of the Federal Rules of Civil Procedure and none of which is properly before the Court. Their inclusion in petitioners' Appendix before the Court of Appeals constitutes an improper attempt to establish nonexistent, misleading, irrelevant or argumentative facts which were not before the District Court. For example, petitioners state that in 1949, 1955 and 1960 there were transfers of control of IDS which constituted "assignments" under the Act. (Pet'n 7). Not only do these events antedate the matters complained of herein, but petitioners neglect to reveal to the Court that in each of these instances there was a transfer of a large block of IDS stock. The 1949 transaction was admittedly an "assignment" and application was made to the SEC for an exemption under section 6(c) of the Act. In 1955 and 1960 the contracts were submitted to the stockholders of Mutual for approval prior to their execution. (R. 95).

[3] References such as "29b" are to page 29 of respondent's Appendix before the Court of Appeals. References such as "29a" are to petitioners' Appendix before the Court of Appeals.

Alleghany, a publicly-owned carrier within the meaning of and subject to the Interstate Commerce Act, at all relevant times controlled IDS by means of ownership of at least 47.6% of IDS' outstanding voting stock. (29b-30b, 75b). Alleghany in turn, as of January 1, 1960, was controlled by Allan P. Kirby through his direct and indirect ownership of 571,200 shares of Alleghany's common stock and 143,210 shares of 6% convertible preferred. (30b, 71b-72b). He was the largest single stockholder of Alleghany, as well as its chief executive officer, and he had personally selected and nominated each of the members of the Alleghany board. (30b, 92b-93b).

The next largest stockholder of Alleghany was Robert R. Young's widow, who, individually and as executrix of Mr. Young's estate, owned 250,717 shares of common and 160,320 shares of the convertible preferred. (72b). On January 30, 1960 Mrs. Young entered into a contract to sell all her Alleghany stock to the Murchisons, who theretofore had had no substantial stock interest in Alleghany. (35b, 86b-87b, 96b). Upon signing the contract, the Murchisons immediately acquired all voting rights to the Young stock. (35b, 86b).

Thereafter, on April 6, 1960, IDS and Mutual entered into the investment advisory and underwriting contracts here in issue. (29b, 68b).

In September, 1960, the Murchisons, together with two other Alleghany stockholders, organized a Stockholders Committee to unseat Kirby and elect a new board of directors. (31b-32b, 88b-89b). By April 14, 1961, the record date for Alleghany's 1961 annual

meeting, the Murchisons and their "participants" and "associates"[4] owned a total of 2,136,338 shares of common stock, or about 22% of those outstanding. (32b, 34b, 72b-73b, 90b, 105b-106b). These had been acquired by the Young contract, by hundreds of purchases of common and preferred shares and warrants in the open market, and by the conversion of such preferred shares and the exercise of the warrants. (45b-46b, 75b-91b, 94b-105b). The other members of the Committee and their participants and associates owned or had acquired 717,632 shares of common stock (7%). (90b). Thus the Stockholders Committee owned a total of 2,853,970 shares (29%) on the record date. (94b-105b).

Kirby had engaged in similar buying and on the record date he and his participants and associates owned 3,303,289 shares (33.6% of those outstanding), of which Kirby and his associates owned 3,268,547 shares (over 33%). (34b, 106b-111b).

The stockholdings of the two opposing forces were thus 4% from a stand-off, and the proxy fight became a contest to win over a sufficient number of the uncommitted stockholders owning 38% of the outstanding common shares to carry the election. At the annual meeting, 3,043,746 common shares not owned or affiliated with either group (the "free" shares) were represented. (37b, 43b-44b). At least 2,172,031, or 71% of all the "free" shares, were voted for the Stockholders Committee slate, which won the election by about 854,000 votes (8.5% of the total common shares outstanding). (*Ibid.*)

[4] As such terms are defined in Regulation 14A of the Securities and Exchange Commission, relating to the solicitation of proxies, 17 C.F.R. §§ 240.14a-1(a), 11(b).

Thus, the Murchisons and their allies with the shares purchased from Mrs. Young, *plus* shares owned before the proxy contest, *plus* shares purchased on the open market, *plus* the proxies of 2,172,031 "free" shares, were successful in wresting the management of Alleghany from Kirby. The tellers certified the result of the election on May 23, 1961, and, on that day, the new directors elected John D. Murchison as president and chief executive officer of Alleghany. (5b). On July 18, 1961, at a special meeting of IDS shareholders, Alleghany caused the election of eight new members to IDS' board of directors, at the same time retaining two holdovers, and, on that date, Clint W. Murchison, Jr. was elected chairman. (*Ibid.*)

Throughout the period of the proxy contest and thereafter Alleghany did not sell or transfer a single share of its IDS voting stock. (75b).

During the proxy contest and thereafter IDS and Mutual continued to perform the investment advisory and underwriting agreements entered into on April 6, 1960. Mutual's stockholders were advised in a proxy statement sent them in connection with Mutual's annual meeting held April 5, 1961 of the pendency of the Alleghany proxy contest.[5] (68b; Exhibit E, p. 8, to affidavit of Robert S. Ersted, R. 1179-82). They were also advised of the election of the new directors at IDS on July 18, 1961 by a supplement to Mutual's Prospectus issued to all stockholders of Mutual the day after such election took place. (R. 119).

[5] At this meeting the stockholders of Mutual rejected overwhelmingly three resolutions proposed by a dissident stockholder to terminate the investment advisory and underwriting agreements herein involved. (68b-69b).

The directors of Mutual were fully cognizant of the changes in the management of both Alleghany and IDS, but neither they nor the stockholders of Mutual took any action to terminate the contracts, as they had the right to do on 60 days notice. (56b, 66b). Indeed, on March 20, 1962, Mutual's directors, all but two of whom had been elected by Mutual's stockholders before the change in Alleghany's management, voted to renew the investment advisory and underwriting agreements with IDS for an additional year. (20b-21b, 69b).

On January 17, 1962, almost 8 months after the conclusion of the Alleghany proxy contest, petitioners brought this action alleging that as a result of the proxy contest the IDS-Mutual contracts had been assigned. On March 29, 1962, the District Court denied a preliminary injunction prohibiting further performance of these contracts. 203 F. Supp. 478. The Court of Appeals affirmed on May 18, 1962. 303 F.2d 276. On June 22, 1964, the District Court granted respondent's motion for summary judgment dismissing the complaint. 231 F. Supp. 142. On February 10, 1965, the Court of Appeals affirmed in a unanimous decision. 342 F.2d 33. Petitioners now seek a writ of certiorari to review that decision.

ARGUMENT

Section 2(a)(4) of the Act defines "assignment" as—

> "any direct or indirect transfer . . . of a contract . . . by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor".

Throughout this litigation petitioners have remained more or less indifferent to their contention that there was a transfer of a controlling block of stock, either of IDS or Alleghany. They have now entirely abandoned that contention and rest their case on the proposition that *any change* in the control or management of IDS or Alleghany, *however achieved,* results in the assignment of the IDS-Mutual contracts.[6] The short answer is that the language of the Act simply does not support petitioners' contention. As stated by the Court of Appeals, if Congress had so intended "nothing could have been simpler than to specify that any change of 'control or management' of an advisor constituted a transfer." 342 F.2d at 40. Instead, Congress chose to use the clear and precise language of section 2(a)(4).

Petitioners have stated no reason why this Court should review the refusal of the Court of Appeals to rewrite "a carefully framed statute in which Congress has, with particularity, stated the means and methods, both judicial and administrative, by which its declaration of policy is to be executed." *Doyle* v. *Milton,* 73 F. Supp. 281, 284 (S.D.N.Y. 1947).

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[6] Petitioners continue to say that Alleghany transferred its controlling block of IDS stock from the Kirby management to the Murchison management. (Pet'n 4, 9). But this attempt at semantic legerdemain means only that the Alleghany stockholders voted for a change in management, which is undisputed. The issue of an alleged transfer of a controlling block of Alleghany stock, although now abandoned by petitioners, is discussed briefly below, *infra* pp. 25-29, since it occupied the attention of both the District Court and the Court of Appeals.

I. The Petition Should be Denied Because the Decision Below Raises No Important Question as to the Interpretation of the Investment Company Act of 1940

It is sufficient reason for denying the Petition that petitioners have not suggested—and would have no basis for doing so—that the decision of the Court of Appeals creates any problems, practical or legal, with respect to the future interpretation, operation or administration of the Investment Company Act of 1940.

Petitioners have not alleged, proved or even argued that the change in management of which they complain resulted in any harm or loss to the stockholders of Mutual. Nor have petitioners made any suggestion as to how, in other situations, a similar change in management could result in harm to stockholders of any investment company. Indeed, as recognized by the Court of Appeals, the Act contains a "battery of protective provisions" which serve to protect the stockholders of investment companies from any undesirable changes in the control or management of their investment advisers. 342 F.2d at 41.

Moreover, the factual situation here is literally unique in the history of the Act and is unlikely to be repeated. The events which petitioners seek to equate with an "assignment" relate not to any transactions which fall within the ordinary meaning of the statutory definition of that term, but rather from a widely publicized proxy contest. Furthermore, the proxy contest took place not in the investment adviser itself, but in Alleghany, a publicly-held company which had existed long before its acquisition of a controlling

block of IDS stock and which at all times held other valuable and important assets. As petitioners indicate, this is the only such proxy contest which has taken place in the investment company industry. (Pet'n 4).

Finally, a petition for a writ of certiorari should be denied where, as here, the statutory construction adopted by the Court of Appeals is not only consistent with the language, history and policy of the statute but is also consistent with the day-to-day construction given to the statute by the industry regulated thereby. The construction which petitioners would place on section 2(a)(4) occurred to no one in the investment company industry until the institution of this lawsuit by petitioners. If it had been thought that a Murchison victory in the Alleghany proxy contest might endanger the IDS contracts, this would have been a material fact to be disclosed in the proxy materials, and certainly the Kirby forces would have made effective propaganda use thereof. Moreover, after the Murchison victory at Alleghany the Kirby board continued to sit at IDS for almost two months. If it had been thought that the proxy contest had terminated the IDS-Mutual contracts, these directors would have taken appropriate action to protect these valuable contracts. Similarly, if the directors of Mutual, who were unchanged by the Alleghany proxy contest, had thought that section 2(a)(4) was susceptible to petitioners' interpretation, it can be assumed that they would have taken appropriate action to assure full compliance with the Act.

Petitioner Phillips himself sat on the IDS board of directors throughout the Alleghany proxy contest, and

was at the same time a "consultant" to the Kirby forces at Alleghany. Not once did he suggest to the board of directors of IDS or to Alleghany that the IDS contracts were endangered by the proxy contest. (48b). Only later, after he had ceased to be a director of IDS and after the defeat of the Kirby forces, did he contrive the thought that section 2(a)(4) might possibly be contorted to provide a basis for this present action.

A. The Decision Below is Consistent With the Language of the Act

If this Court were being called upon to review a strained or unusual construction of a federal statute, an appealing argument might be made for granting certiorari. But that is not this case. Here, petitioners ask this Court to use its time and energies to review the unanimous refusal of the Court of Appeals to torture out of recognition the precise and unambiguous language of section 2(a)(4) of the Act.

Section 2(a)(4) defines "assignment" as the "transfer . . . of a contract . . . by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor." This language is not satisfactory to petitioners, and throughout this litigation they have urged a series of alternative revisions, three of which they now seek to bring before this Court. (Pet'n 4, 9, 22). But whatever the particular cast of their language, petitioners' thesis is that the definition of "assignment" should be made to include "any change" in the "control or management" of an investment adviser, or a company owning a controlling block of an investment

adviser's stock, "however achieved". (Pet'n 4, 9, 18, 22, 32).

Thus, under petitioners' theory of the case, the only operative fact is that on May 23, 1961, the stockholders of Alleghany voted the Kirby management out of office. This produced "shifts in the management personnel" (Pet'n 21) and, therefore, an assignment. Whatever power Congress might have to provide that extreme result, it did not do so. The Court of Appeals properly observed:

> ". . . we find it hard to read so broadly terms that Congress appears to have chosen with care, especially when nothing could have been simpler than to specify that any change of 'control or management' of an adviser constituted a transfer. We surely should not do this without firm evidence that Congress considered events like the Alleghany proxy contest as abuses to be remedied by the automatic termination provisions." 342 F.2d at 40.

After reviewing the legislative history of the Act and the kinds of abuses the assignment provisions were in fact intended to correct, the Court of Appeals concluded:

> "We have not been shown the slightest evidence that . . . [Congress] gave any thought to the effect on investment advisory or underwriting contracts of a proxy contest in a publicly held adviser or underwriter—still less of such a contest in a publicly held multi-purpose company controlling the adviser or underwriter. While this history would give no sufficient reason for cutting

down the words that Congress used, it does afford ground for refusing to expand them." 342 F.2d at 40-41.

This conclusion is in no way inconsistent with section 1(b)(6), upon which petitioners affect to place much reliance. That section, which is a part of the Act's declaration of policy, states only that "the interest of investors" is adversely affected "when the control or management . . . [of investment companies] is transferred, without the consent of their security holders." It does not condemn all changes of control or management of an investment adviser but only *transfers* of control or management of an *investment company*. Thus, section 1(b)(6) gives no aid to petitioners in their attempt to rewrite section 2(a)(4). In the first place, section 1(b)(6) refers to the management or control of an investment company (here Mutual, whose officers and directors were not changed as a result of the proxy contest), not to the management or control of an investment adviser.[7] In the second place, it refers to *transfers* of control or management, not all changes of control or management.

The word transfer "contemplates a transferor and a transferee", see *Transamerica Corp.* v. *Lewis*, 126 F.2d 402, 403 (9th Cir. 1942), and there is a vast difference between a "transfer" of control or manage-

[7] In this respect, as in other respects, the case at bar differs from *SEC* v. *Insurance Securities, Inc.*, 254 F.2d 642 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958). In that case, the investment company "had no officers or directors of its own. Management functions were discharged by the service company as sponsor and investment adviser. . . ." 254 F.2d at 645. Here, in contrast, the management of Mutual is vested in its own officers and directors. IDS simply serves Mutual as investment adviser and principal underwriter.

ment on the one hand and a "change" of control or management on the other. The contrast with the statutory term, "transfer . . . of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor," is even more obvious, as is made clear by example:

> (1) Ten stockholders each own 10% of the voting stock of an investment adviser. Consistently they have united in electing directors. The stockholders all retain their respective stockholdings, but now six of them combine against the other four to elect new directors. There is a *change* in control and management, and the six stockholders come into "control". But clearly there is not a *transfer* of control and management, and even more clearly there is no transfer of a controlling block of stock.
>
> (2) Another illustration of the distinction between *change* and *transfer* is well known to petitioner Phillips. The contracts here at issue were approved on April 6, 1960. Thereafter, the composition of the IDS board of directors changed. By reason of deaths, resignations and removals, only one member of the IDS board incumbent on April 6, 1960 was still in office on April 24, 1961. (48b-49b). Thus, there was a total *change* in the management of IDS, a part of which was the advent of petitioner Phillips as a member of the board of directors of IDS and as the chairman of its Finance and Law Committee. At no time did Phillips suggest to his fellow IDS directors that this change in management was a *transfer* of management which terminated the IDS-Mutual contracts.

It was perfectly clear to Congress that, in the nature of things, changes in the control or management of a corporate investment adviser might be expected to take place in a variety of ways. Congress provided for the termination of the investment advisory and distribution contracts in the case of only one such change—namely, when such change is brought about by the "transfer . . . of a *controlling block* of the . . . . [investment adviser's] outstanding voting securities *by a security holder* of the . . . . [investment adviser]."[8] This is a readily identifiable event. Investment advisers and investment companies, and their officers and directors and stockholders, are not left in doubt as to whether their investment advisory and underwriting contracts have been terminated, with all the serious consequences such termination entails. It is only by "what Congress has written, not what Congress might have written", *United States* v. *Great Northern Ry.*, 343 U.S. 562, 575 (1952), that those in the investment company field can govern their conduct.

B. The Decision Below is Consistent With the Legislative History of the Act

As we have stated, this is not a case where this Court is asked to review a decision which ignores or twists statutory language. Nor is this a case where the decision below reaches a result which is contrary to the policy of a statute as shown by its legislative history.

Petitioners have repeatedly resorted to the tactic

[8] The emphasis is ours. Wherever in this brief emphasis is employed, the emphasis is ours unless otherwise stated.

of lifting out of context isolated phrases such as "change of control", "shift of control", "shift in the management personnel" found in the thousands of pages of legislative history of the Act (see, *e.g.*, Pet'n 19-21). They now accuse the Court of Appeals of having "omitted" these considerations from its decision (Pet'n 17-22). These isolated phrases, all of which were brought to the attention of the Court of Appeals, were not overlooked or omitted but were rejected for good reason.

The legislative history of the Act, which was set forth in a supplement to respondent's brief below and which was accurately summarized by the Court of Appeals, 342 F.2d at 40-41, demonstrates that the precise language used in section 2(a)(4) was deliberately chosen by Congress and was directed, not to changes in the control or management of investment advisers, but to the then prevalent practice of "trafficking" in the control of investment companies. "Trafficking" was the shorthand term used by the SEC to describe the practice by which sponsors and existing managements of investment companies, having fiduciary duties to the stockholders of such companies, secretly transferred investment advisory or distribution contracts or sold control of such companies to outsiders with interests adverse to those of the stockholders. It was to prevent such transfers by a fiduciary of his fiduciary obligations that Congress included sections 15(a)(4), 15(b)(2), and 2(a)(4) in the Act. This is made clear by an opinion of the General Counsel of the SEC released not long after the adoption of the Act:

> "The legislative history of Section 15 manifests clear Congressional intention to prevent all traf-

> ficking in investment advisory contracts *and to prevent an investment adviser from transferring his fiduciary obligations by turning over the management of the stockholders' money to a different person.* That intention is effectuated by the requirement in Section 15(a) that every investment advisory contract made after March 15, 1940, must provide for its automatic termination upon assignment. . . .
>
> "Thus, Congress has said that an investment adviser cannot assign his contract and cannot transfer his fiduciary obligations. . . . In my opinion the legal status of an investment adviser is similar to that of a trustee of a trust or a director or officer of a corporation, and the investment adviser is under the same prohibitions against selling his trust." *Opinion of General Counsel,* Investment Co. Act Release No. 354 (May 11, 1942), CCH Fed. Sec. L. Rep. ¶75,281.

The dangers inherent in such breach of fiduciary duty simply do not exist in the case at bar. There is a complete contrast between the facts of the instant case and the "trafficking" which Congress sought to prevent by the "assignment" sections of the Act. Here, there was plainly no sale of a trusteeship or other breach of a fiduciary relationship on the part of anyone who was in a position of control, whether through stock ownership, board control, management contracts or otherwise, at Mutual, IDS or Alleghany. The change in Alleghany management was determined by the votes of the Alleghany stockholders conducted in the "glare" of a highly publicized proxy contest. 342 F.2d at 41.

C. The Decision Below is Consistent With the Remedial Purposes of the Act

The decision of the Court of Appeals in no way dilutes the protections afforded by the Act to stockholders of investment companies.

The "assignment" sections of the Act are designed to serve only the specific and limited purpose of preventing fiduciaries from transferring their fiduciary obligations to others. To protect investment company stockholders from undesirable "changes" or "shifts" in control or management, as well as to prevent abuses by any management old or new, Congress adopted a host of other provisions. For example, section 9 prohibits certain undesirable persons from serving as officers or directors of investment companies or their investment advisers; section 13(a) prohibits changes of investment policy without stockholder vote; section 16(a) requires that directors of an investment company be elected directly by stockholders; and section 17(a) prohibits the purchase and sale of securities between investment companies and affiliated persons.[9]

These and other protective sections of the Act which were recognized by the Court of Appeals, 342 F.2d at 40-41, are completely ignored by petitioners and by the Columbia Law Review note cited so extensively in the Petition.[10] Similarly ignored is the all-encompassing remedy found in the requirement of section 15(a)(3) that investment advisory contracts

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[9] See, also, sections 10, 11, 12(d), 17(g), 18, 20, 36, and 37, which offer further protection to investment company stockholders.

[10] Note, *Termination of Management Contracts Under the Investment Company Act*, 63 Colum. L. Rev. 733 (1963).

must specifically provide for their termination, without penalty, at the instance of either the stockholders or the board of directors of an investment company, at any time on 60 days' notice, and for whatever reason.

Furthermore, sections 15(a)(2), 15(b)(1), and 15(c) require that the continuation of an investment advisory or underwriting agreement for more than two years from the date of its execution must be specifically approved at least annually either by a majority of the fund's board of directors, including a majority of its independent directors, or by a majority of its outstanding voting securities.

Thus, Congress gave investment company stockholders and directors the discretionary right to review and reject any and all changes of control or management of their investment adviser, and reserved the drastic sanction of automatic termination for instances of "trafficking".

In the case at bar, Mutual's stockholders and directors had knowledge of—and indeed were specifically advised of—the changes in management of Alleghany and IDS which resulted from the Alleghany proxy contest. They chose to take no action to terminate the contracts, as they had the right to do. (56b). On the contrary, on March 20, 1962, the directors of Mutual, all but two of whom had been elected by Mutual stockholders prior to May 23, 1961, voted to renew and continue the investment advisory and underwriting contracts with IDS. Clearly, none of the protections of the Act was denied to the stockholders of Mutual.

II. The Petition Should be Denied Because the Decision Below is Not in Conflict With Any Other Decision

Not finding any conflict among the circuits, or among any courts whatsoever, petitioners have attempted to construct a "conflict" *within* the Securities and Exchange Commission as to the matters at issue here. If any such "conflict" did exist, it was resolved by the SEC itself and would afford no issue needing resolution by this Court any more than a conflict within a single circuit which is resolved by an *en banc* decision of the circuit itself. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957); *CAB* v. *American Air Transport, Inc.,* 344 U.S. 4, 5 (1952).

The "conflict" which petitioners seek to create (Pet'n 9-10) is based on a political speech by Senator William Proxmire, appearing in the *Congressional Record,* opposing the confirmation of Hamer H. Budge as a member of the Securities and Exchange Commission. In that speech, Senator Proxmire stated that Allan F. Conwill, Esq., while he was Director of the Division of Corporate Regulation of the SEC, urged that the SEC, in connection with petitioners' appeal from denial of a preliminary injunction, file an *amicus* brief adopting the position that any change in control or management results in an assignment; that the SEC at first acceded to Mr. Conwill by a 4 to 1 vote; but that upon reconsideration the SEC voted 3 to 2 not to do so.

While we are not privy to the inner councils of the SEC and cannot represent to the Court what positions individual commissioners may have taken, we can

state that Senator Proxmire's information as to Mr. Conwill was incorrect. Mr. Conwill authorized us to represent to the Court of Appeals—and we did so—that neither publicly nor privately did he ever take the position attributed to him by Senator Proxmire.[11]

In any event, the SEC was and is well able to express its own views, as it did in the *amicus* brief which it filed in 1962. In that brief it took the position that *if* there had been a transfer of a controlling block of Alleghany stock, this would have constituted an assignment of the IDS-Mutual contracts. However, neither at that time nor at any other time did the SEC urge that there was such a transfer in this case. Nor has it ever expressed the view that *every* change in the control or management of an investment adviser, or of a corporation controlling the investment adviser, constitutes an "assignment" of the investment adviser's contracts.

Nor is the decision of the court below in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *SEC* v. *Insurance Securities, Inc.*, 254 F.2d 642, *cert. denied*, 358 U.S. 823 (1958). In that case directors owning a controlling block of the stock of a service company, which acted as the manager of an investment company, "embarked upon a plan to transfer control of the service company to a small number of purchasers affiliated among each other through stock ownership and otherwise." 254 F.2d at 645. They ultimately sold to the affiliated purchasers 40.8% of the outstanding voting securities of the service

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[11] By quoting only part of Senator Proxmire's remarks, petitioners neglect to inform the Court that Senator Proxmire was addressing himself more to the position allegedly taken by Mr. Conwill than to the position of the SEC itself. See *Congressional Record*, June 26, 1964, p. 14729.

company. This clearly constituted a "transfer . . . of a controlling block of the assignor's outstanding voting securities by . . . security holder[s] of the assignor" and consequently an "assignment" of the service contract. No one seriously contended to the contrary. The only issue before the Ninth Circuit was whether this transfer of control by fiduciaries constituted a gross abuse of trust within the meaning of section 36 of the Act, thereby invoking other consequences. The Ninth Circuit refused to expand the consequences of an "assignment" beyond that of termination of the contract.

III. There Was No Transfer of A Controlling Block of Alleghany Stock

Although petitioners seek no review of the factual determination that there was no transfer of a controlling block of Alleghany stock, we mention this issue because of the attention given it by the court below and because of petitioners' reference to the position taken by the SEC.

In 1962, when the District Court denied petitioners' motion for a preliminary injunction, the SEC was apparently concerned that language used in the court's decision, 203 F. Supp. 478, might be construed to limit the Act's effectiveness where a "two corporation arrangement" was used as a "means of evasion" of the Act. Upon appeal from the denial of the preliminary injunction, the SEC filed an *amicus* brief in which it expressed the view that *if* there had been a transfer of a controlling block of Alleghany stock, this would have been the equivalent of the transfer of a controlling block of IDS stock. In upholding the District Court's denial of preliminary injunction, the Court of

Appeals did not find it necessary to pass on this issue. 303 F.2d 276, 277.

Later, on motion for summary judgment the District Court expressed its willingness to accept the view of the SEC but found, on the basis of undisputed facts, that there had in fact been no transfer of a controlling block of Alleghany stock. The Court of Appeals, in reviewing the final judgment of the District Court, expressed considerable skepticism as to whether the "Draconian sanctions of §15(d)" could properly be applied to the transfer of a controlling block of Alleghany stock as distinguished from the transfer of a controlling block of IDS stock. 342 F.2d at 37. The Court recognized that the statute refers only to the transfer "of a controlling block of the assignor's outstanding voting securities *by a security holder of the assignor;*"[12] that the assignor referred to is the investment adviser itself; and that to ignore IDS and to treat Alleghany as the investment adviser has no direct statutory sanction, particularly in the absence of any contention that Alleghany had been created or used as a device for evading the provisions of the Act. Conceding that it was stretching section 2(a)(4) "as far as permissible—if not indeed too far—when we treat the case as if Alleghany itself were the investment adviser," 342 F.2d at 37, the Court nevertheless assumed, *arguendo*, that the statutory definition was broad enough to include a transfer of a controlling block of the voting securities of Alleghany.[13]

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[12] Emphasis in opinion, 342 F.2d at 37.

[13] If petitioners had sought review of the finding that there was no transfer of a controlling block of Alleghany stock, we would strongly urge upon this Court the proposition that section 2(a)(4) cannot be expanded in such manner as to ignore IDS

It then reviewed and affirmed the District Court's finding that there was no transfer of a controlling block of Alleghany stock. This finding is, of course, compelled by the record.

At the conclusion of the proxy contest the members of the Stockholders Committee owned only 29% of the outstanding Alleghany common stock. This figure did not, however, represent a "block" of stock which had been transferred, but rather the aggregate of the separate and distinct holdings which had been acquired by more than 50 different persons and entities. The only sizeable block of Alleghany stock which was transferred to the Murchisons was the Young stock. But petitioners never contended that this was the transfer of a controlling block of stock which terminated the IDS-Mutual contracts. This transfer, for purposes of the Act, took place in January, 1960, prior to the adoption and approval of the contracts in April, 1960. Moreover, the Young stock concededly never constituted a controlling block. As stated by the Court of Appeals:

> "Indeed, appellants do not seriously urge that IDS' contracts with Investors Mutual were assigned by the Murchison's acquisition of purchase and voting rights in the Young stock early in 1960 or even by the outright transfer of the stock itself in April, 1961, standing alone. They say rather that the transfer of the Young shares, *plus* the purchase of other shares, *plus* the grant of proxies by the majority of the 'free' stock, assuring the

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and treat Alleghany as the investment adviser. "If Congress meant to alter ordinary judicial rules governing corporations, it should have so provided specifically." *In re Gibraltor Amusements, Ltd.*, 291 F.2d 22, 25 (2d Cir.), *cert. denied*, 368 U.S. 925 (1961).

subsequent Murchison victory and the attendant change in Alleghany's board, constituted the assignment. . . . But the provision speaking of the 'transfer . , . .of a controlling block' contemplates that such a block exist and be transferred and not merely that purchases of large and small amounts eventually bring the controlling interest into one pair of hands. We recognize that a coordinated transfer by several associates sharing the controlling interest among them may meet the definition, compare SEC v. Insurance Sec., Inc., 254 F.2d 642 (9 Cir.), cert. denied, 358 U. S. 823 (1958). Yet by no stretch of the statutory language can the block sold by Mrs. Young be swelled by the unrelated sales to the Murchisons by numberless other sellers, let alone by the revocable proxies given by those who never sold their stock at all. . . ." 342 F.2d at 39.

The legislative history of the Act shows that the SEC and Congress regarded a "controlling block" of stock as one sufficient in and of itself at least to insure working control of a company.[14] The Young stock was not of sufficient magnitude to give the Murchisons working control of Alleghany, or even

[14] The summary of legislative history appended to the brief of respondent IDS before the Court of Appeals includes a table setting forth 24 instances where control of a corporation, either an investment company or an investment adviser, was transferred through sale of a "controlling block". In each example, the block of stock transferred (from 28% to 100% of the corporation's voting stock) either gave absolute majority control or, where less than a majority of the stock was transferred, gave working control by reason of the diffusion of the remaining voting securities and the disinterested attitude of the holders thereof. In each example, the pre-existing controlling block was transferred to someone else by the person or persons who owned it.

any influence over management. A long, bitter, expensive proxy contest was necessary to achieve that result. Indeed, even if all the Alleghany stock (29%) owned by all members of the Stockholders Committee had been transferred in one block, this would not have been a "controlling block". At all times Kirby's stockholdings were greater. He selected and nominated the directors, he designated the officers, he controlled the proxy machinery, and, to say the least, he was bitterly antagonistic to the ambitions of the Stockholders Committee. Under these circumstances, the balance of control resided in the votes of thousands of other Alleghany stockholders. The election of the Stockholders Committee nominees in May, 1961, was, as the District Court found on the undisputed facts:

> ". . . not due to the transfer of a controlling block of stock by a security holder but rather to the success of the Murchisons in securing the votes of stockholders who did not transfer their securities but who gave their proxies to the Murchison committee." 231 F. Supp. at 145.

Conclusion

Petitioners have stated no reason why this Court should review a decision which is consistent with the language, history and policy of the Act and which refuses to place on the Act the tortured construction urged by petitioners. For this reason, as well as for the reason that the decision below is clearly correct, respondent IDS respectfully asks that the petition for a writ of certiorari be denied.

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June 8, 1965

Respectfully submitted,

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